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ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-1315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM D. BUNCH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Sam B. Weiner
SHEWARD & WEINER
743 South Front Street
Columbus, Ohio 43206
Telephone: 614/443-6581

Counsel for Petitioner,
William D. Bunch

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APPENDIX A

Filed
Dec. 2, 1982
John P. Hehman,
Clerk

No. 82-3118

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. ORDER

WILLIAM DON BUNCH,

Defendant-Appellant

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

William D. Bunch appeals his conviction for tax evasion. 26 U.S.C. § 7201 1954). We affirm.

Relying on the "net worth plus non-deductible personal expenditures" theory of proof, the government proved to the jury's satisfaction that Bunch evaded paying income tax in 1973, 1974, and 1975. Upon conviction, he was given the following sentence: Count I - one year and one day in

prison plus a $5,000 fine; Count II - four years probation to run consecutively with the prison sentence imposed for Count I conditioned upon payment of the fine imposed for Count I; Count III - the same sentence as Count I, concurrent with Count II. Bunch is free on a $25,000 bond pending appeal.

Bunch raises several issues here. The first and second deal with the sufficiency of the evidence. Bunch argues that there was insufficient evidence to support the jury's finding that, as to Count II, he attempted to evade paying income tax "on or about April 15, 1975." We disagree. Like the court below, we find sufficient evidence to support the conviction, regardless of whether the sale of the West Lane Avenue property was or should have been included in the government's calculations.

Bunch also makes the general assertion that the evidence as a whole does not support the verdict. Again, we disagree.

When viewed in the light most favorable to the government, the evidence is not deficient. In so holding, we are mindful of the Supreme Court's direction that "the cogency of...[the government's]...proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." United States v. Holland, 348 U.S. 121, 135, quoted in United States v. Giacalone, 574 F. 2d 328, 332 (6th Cir. 1978).

Bunch's third argument that the district court erred in refusing to order the government to produce the Internal Revenue Service's Special Agent Report is equally without merit. The district court stated in its May 12, 1981 Order denying Bunch's Motion for Production that Fed. R. Crim. P. 16(a)(2) "limits discovery otherwise allowed by providing that the government need not disclose 'reports, memoranda, or other internal government documents made by... government agents in connection with the

investigation or prosectuion of the case.'" Rule 16(a)(2) disposes of this issue.

We have no difficulty in disposing, in a like fashion, of Bunch's argument that the admission, pursuant to the business records exception to the hearsay rule, of certain financial records, including personal checks, loan applications, and other bank records, denied him his sixth amendment right to confront and cross-examine his accusers. As the Supreme Court stated in Dutton v. Evans, 400 U.S. 74, 89 (1970), quoting California v. Green, 399 U.S. 149, 161 (1970), the "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" Business records are an exception to the hearsay rule precisely because of their inherent reliability. Where business records are appropriately

introduced, as they were here, the concerns of the Confrontation Clause are adequately met.

In his fifth argument, Bunch claims that the government failed to establish with reasonable certainty his opening net worth as of January, 1973. Specifically, he argues that it failed to accurately ascertain the amount of cash-on-hand in the base year; it failed to accurately account for the effect of his purchase and sale of certain real estate on net worth calculations; and it failed to include among his assets furniture allegedly in his possession with a value of $15,000.

In Holland, a tax evasion case in which the government relied upon the net worth theory, the Supreme Court held:

> [A]n essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a staring point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is

> immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.

348 U.S. at 132 (emphasis added). See, Giacalone, 574 F. 2d at 331. Moreover,

> When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer--leads reasonably susceptible of being checked, which if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

Id. at 135-136. Examining Bunch's claims in light of these commands, we are persuaded that the government has carried its burden of establishing with reasonable certainty the amount of cash-on-hand as of January, 1973. Moreover, we find no fault with the treatment of the purchase and

sale of the Charing Road apartments. We have some difficulty, however, with the manner in which the government treated the question of furniture.

In evidence as a government exhibit was a November 3, 1971 financial report submitted by Bunch to City National Bank. Under "assets", the report listed $15,000 worth of home and office furnishings. On cross-examination, the government's witness was asked to explain the exclusion. "[B]ecause I have not seen any evidence to the point that they were still in Mr. Bunch's hands at the end of 1972", he replied.

It is for the government, if it proceeds on a net worth theory, to negate the validity of any "relevant leads...reasonably susceptible of being checked." Until and unless it does so, the burden of proof does not shift to the taxpayer. The government witness' statement implies a misunderstanding of this fact. In this case, the November 3, 1971 financial report

was indisputably a relevant lead to an asset which was, we think, reasonably susceptible of being checked. It is unclear from the record whether it was checked.

In this case, however, the effect of an error on the government's part was harmless. Once the $15,000 is credited to Bunch as a component of net worth in January, 1973, its effect is merely to increase the absolute net worth valuations then and in subsequent years. It will not change the relative fluctuation in net worth between those years nor, therefore, will it change the calcuations of tax deficiency.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

S/ John P. Hehman
Clerk

ISSUED AS MANDATE: December 28, 1982
COSTS: None

*This order was prepared by Judge Martin.

KENNEDY, Circuit Judge, concurring in part and dissenting in part.

I concur in all of the Court's order except that portion which holds that the listing of $15,000 worth of home and office furniture on a financial report submitted by Bunch to City National Bank on November 3, 1971 constitutes a "relevant lead" which the government was required to check. When the Court in Holland v. United States, 348 U.S. 121 (1954), discusses relevant leads, it does so in terms of suggestions from the defendant.

> Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases spring, is sufficient.
>
> * * *
>
> Any other rule would burden the Government with investigating the many possible nontaxable sources of income, each of which is as unlikely as it is difficult to

> disprove. This is not to say that the Government may disregard explanations of the defendant reasonably susceptible of being checked. But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter of peculiarly within the knowledge of the defendant. See, Rossi v. United States, 289 U.S. 89, 91-92.

At 137-38. While under investigation for tax evasion, Bunch did not submit the existence of the furniture as an explanation which might tend to establish his innocence. Had Bunch mentioned that he possessed the furniture, then I would agree that such suggestion would constitute a lead to be pursued. The information here did not constitute a "relevant lead."

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, :

vs. : CASE CR-2-80-62

WILLIAM DON BUNCH, :

Defendant. :

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date -- 2/1/82.

Finding & Judgment - Defendant has been convicted as charged of the offense(s) of income tax evasion, in violation of Title 26 United States Code, Section 7201. (Counts I, II and III of the Indictment)

Certified as a true copy
on this date 2/1/82
By S/ William E. Baker
Deputy

S/ John D. Holschuh

Date February 1, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed
Jan. 25'82
2:16 pm
John D. Lyter,
Clerk

UNITED STATES OF AMERICA, :

Plaintiff, :

vs. : Case CR-2-80-62

WILLIAM DON BUNCH, :

Defendant. :

MEMORANDUM AND ORDER

In a jury trial commencing August 10, 1981, William Don Bunch was tried on three counts of attempting to evade income tax due and owing by him to the United States of America. Count I of the indictment charges the defendant with willfully and knowingly attempting to evade income tax due and owing by him to the United States of America for the calendar year 1973. Count II charges the defendant with willfully and knowingly attempting on or about the 15th day of April, 1975 to evade income taxes due and owing by him to the United States of America for the calendar

year 1974. Count III charges the defendant with willfully and knowingly attempting to evade income taxes due and owing by him to the United States of America for the calendar year 1975.

On September 18, 1981, the jury found the defendant guilty of Count I, Count II and Count III. The defendant has filed a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c).

I. STANDARD FOR RULING ON THE MOTION FOR JUDGMENT OF ACQUITTAL

Previous motions by this defendant for judgment of acquittal were made at the close of the Government's case and at the close of all the evidence, pursuant to Fed. R. Crim. P. 29(a), and were denied by the Court. The same standard is to be applied in ruling on a motion for judgment of acquittal regardless of at what stage of the proceedings the motion is made. United States v. Austin, 585 F. 2d 1271 (5th Cir. 1978); United States v. Felice, 481 F. Supp.

79, 87 (N.D. Ohio 1978), aff'd 609 F. 2d 276 (6th Cir. 1979); Wright, Federal Practice and Procedure: Criminal §467 (1969); 8A Moore's Federal Practice ¶29.06 (1981).

Pursuant to Rule 29(a), a court "shall order the entry of judgment of acquittal...if the evidence is insufficient to sustain a conviction." This rule was thus interpreted by the Sixth Circuit in United States v. May, 430 F. 2d 715, 717, 718 (6th Cir. 1970):

> The test for determining the sufficiency of the evidence to sustain a motion for judgment of acquittal is well settled and is clearly set forth in United States v. Conti, 339 F.2d 10, 13 (6th Cir. 1964).
>
> > In testing the sufficiency of the evidence to withstand a motion for judgment of acquittal the trial court judge does not pass upon the credibility of the witnesses or the weight of the evidence. On the contrary, he must view the evidence and the inferences that may justifiably be drawn therefrom in the light most favorable to the Government. [The many citations omitted]. If, under such view of the evidence he concludes that a reasonable

> mind might fairly conclude guilt beyond a reasonable doubt, the motion should be overruled and the issue left to the jury. It is only where under such view of the evidence he concludes there must be such a doubt in a reasonable mind, should the motion be granted. [The many citations omitted.]
>
> ...
>
> The fact that the evidence is largely circumstantial is inconsequential. Circumstantial evidence, if strong enough to convince a jury of a defendant's guilt beyond a reasonable doubt, is sufficient to take a case to the jury and sustain a verdict. [Citations omitted.]

Accord, United States v. Lewis, No. 80-5183, slip op. at 3 (6th Cir. June 19, 1981); United States v. Gaines, 353 F. 2d 276, 278 (6th Cir. 1965); United States v. Berkley, 288 F. 2d 713, 716 (6th Cir.), cert. denied, 368 U.S. 822 (1961); United States v. Ellis, 493 F. Supp. 1092, 1094-5 (M.D. Tenn. 1979), aff'd, 617 F. 2d 604 (6th Cir.), cert. denied, 101 S. Ct. 119 (1980); United States v. Gibson, 486 F. Supp. 1230, 1233 (S.D. Ohio 1980).

Applying these standards to the evi-

dence adduced as to each count, the Court concludes that the motion for judgment of acquittal should be denied. The Court has carefully considered the evidence presented at trial, and, viewing the evidence and the inferences justifiably drawn therefrom in the light most favorable to the Government, concludes that a reasonable juror could find beyond a reasonable doubt each of the essential elements of the crimes of which the defendant was convicted, and thus could fairly conclude guilt beyond a reasonable doubt on each count of the indictment.

The defendant's motion basically raises two issues. First, the defendant argues that the Government failed to establish with reasonable certainty the beginning net worth of the defendant. Additionally, the defendant argues that the guilty verdict was improper since the defendant did not have any duty to report the gain from the sale of his Lane Avenue residence until October 15, 1975.

II. FAILURE TO ESTABLISH OPENING NET WORTH

The defendant's argument that the Government failed to establish the defendant's opening net worth is two pronged. First the defendant argues that I.R.S. Revenue Agent Barbara Kastl failed to adhere to the Special Agents Handbook's guidelines which deal with establishing a firm opening net worth for the defendant.[1] Therefore, the defendant argues the verdict should be set aside because the I.R.S. is bound to follow its own rules and regulations. Additionally, the defendant argues that equipment and furniture owned by the defendant were ignored by the Government in determining the defendant's opening net worth.

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[1] The Court notes that the Special Agents Handbook was never offered into evidence. A few passages from the Handbook were read into the record during the trial. The Court finds it exceedingly difficult to adequately analyze the guidelines in question without ready access to those guidelines.

A. Accardi Doctrine

The defendant attempts to base its Fed. R. Crim. P. 29(c) motion in part on the principle that an agency is bound to follow its own rules and regulations. That principle was enunciated in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

In Accardi, an alien brought a habeas corpus action attacking the validity of the denial of his application for suspension of deportation. He claimed that his application to the Board of Immigration Appeals had been prejudged because, prior to the Board's decision, the Attorney General had included the alien on a confidential list of "unsavory characters" whom the Attorney General wished to deport. 347 U.S. at 262. The Supreme Court was faced with the issue of whether the alleged conduct of the Attorney General deprived the alien of any rights guaranteed him by statute or by regulation.

The Supreme Court reviewed the oper-

ative regulations applicable to appeals from deportation decisions. Those regulations expressly required the Board of Immigration Appeals to exercise the same discretion and power that had been conferred upon the Attorney General by law. The Supreme Court concluded that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." Id. at 267. The Supreme Court therefore held that if the petitioner could prove his allegations that the Board had failed to exercise its discretion under the regulations, he would be entitled to a new hearing before the Board without the burden of the previous proscription by the Attorney General's list.

The Accardi doctrine has subsequently been applied by the Supreme Court to invalidate discharges of federal employees when safeguards required by agency regulations were not provided. See Vitarelli v. Seaton,

359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957).

The Accardi doctrine has also been applied in the context of criminal prosecutions. See United States v. Heffner, 420 F. 2d 809 (4th Cir. 1969); United States v. Jones, 368 F.2d 795 (1966). In Heffner, the Fourth Circuit reversed the defendant's conviction. The court noted:

> It is of no significance that the procedures or instructions which the IRS has established are more generous than the Constitution requires. In Service v. Dulles, supra, the Supreme Court vitiated the discharge of a foreign service officer because of the State Department's failure to follow its own procedures. The Court concluded that it made no difference that the State Department had no statutory or constitutional obligation to establish the procedure in question:
>
> > While it is of course true that ...the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards....having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.
>
> 354 U.S. at 388, 77 S. Ct. at 1165. See also Vitarelli v. Seaton, supra.

> Nor does it matter that these IRS instructions to special agents were not promulgated in something formally labelled a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the Accardi doctrine has a broader sweep. The Supreme Court in Vitarelli v. Seaton, supra, applied it to a Department of the Interior "Order." The Second Circuit has applied it to the Army's "Weekly Bulletin 42," §4(c) (Oct. 20, 1967). Smith v. Resor, 406 F.2d 141, 143-144 & n. 2, 146 (2 Cir. 1969). The District of Columbia Circuit has applied the doctrine to a FCC "rule" which had not been formally promulgated but which the court found had been established by the FCC's "usual practice" of including the rule in its orders. Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 269 F.2d 221, 224-225 & nn. 8 & 9 (1959). See also McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955) (alternatife holding). The same court has also applied the doctrine to FCC "Standards." American Broadcasting Co., Inc. v. FCC, 85 U.S. App. D.C. 343, 179 F.2d 437, 442-443 (1949). Finally, in United States ex rel. Brooks v. Clifford, 409 F.2d at 706, this court applied the doctrine to a Department of Defense "Directive."

420 F.2d at 812.

The defendant in United States v. Jones, 368 F.2d 795 (2nd Cir. 1966), had been convicted under 18 U.S.C. §1407 for failing to register as a narcotics user upon entering the United States. The

Secretary of the Treasury had promulgated a regulation under this statute requiring customs officers to furnish registration forms to narcotics users, and no such form had been furnished to Jones. The Court of Appeals reversed the conviction, holding:

> Our decision rests on the principle that because the Government has failed to follow its own regulation promulgated in the proper exercise of the Secretary of the Treasury's discretion, its action can have no effect. In other words, having failed to supply Jones with Form 3231 and to give him the opportunity to register provided for in the Regulation, his arrest and indictment are invalid. There is no novelty in holding that where an official is given discretionary power by statute, promulgates regulations as to how the power is to be exercised and then fails to follow his own regulations, the action is of no effect.

368 F.2d at 799 (citations omitted).

This Court does not question the validity and continuing vitality of this rule of law. See United States v. Nixon, 418 U.S. 683 (1974). However, this Court notes that exceptions have developed to the Accardi doctrine. Government agencies have

been permitted to depart from their regulations when those regulations were designed to govern internal agency procedures rather than to protect an interest of some other party. See, e.g., American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970). These cases have noted that the agency rules in question "were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion... [citation omitted]; nor [are these cases] in which an agency required by rule to exercise independent discretion has failed to do so." American Farm Lines, supra, at 538-39. Cases involving regulations designed to govern internal agency procedures are exempted from the Accardi doctrine because:

> [T]here is no reason to exempt [these cases] from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly

> transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." NLRB v. Monsanto Chemical Co., 305 F.2d 763, 764.

Id. at 539.

Thus a number of cases have concluded that the Accardi doctrine applies only (1) when the agency's regulations are designed to protect the party dealing with the agency and (2) when the agency's departure from those regulations results in prejudice to that party. See, e.g., Mayor and City Council of Baltimore v. Mathews, 562 F.2d 914 (4th Cir. 1977), cert. denied, 439 U.S. 862, vacated on other grounds, 571 F.2d 1273 (4th Cir. 1978); Usery v. Board of Ed. of Baltimore County, 462 F. Supp. 535 (D. Md. 1978).

In United States v. Caceres, 440 U.S. 7431 (1979), the Supreme Court further explained and refined the scope of the Accardi doctrine. In Caceres the Supreme

Court refused to apply the Accardi doctrine to exclude evidence obtained in violation of Internal Revenue Service regulations. The Court appeared to apply a two pronged analysis in deciding whether the courts had a duty to enforce an agency regulation. First, the Court looked to see if "compliance with regulation is mandated by the Constitution or federal law." Id. at 749. If compliance is mandated, then the courts obviously have a duty to enforce the regulation.

In the next step of its analysis the Court looked to see whether the violation of agency regulations raised any constitutional questions. While a rule may not have been adopted to make certain that individuals' constitutional rights are not infringed, the violation of that rule after it is adopted may give rise to constitutional claims. This second prong of the Caceres analysis appears to reflect the rationale of those cases which hold that

the Accardi doctrine only applies when the agency's regulations are designed to protect the party dealing with the agency and when the agency's departure from those regulations results in prejudice to that party. See, e.g., Mayor and City Council of Baltimore v. Mathews, supra.

In the present case it is clear that compliance with the Internal Revenue Service's guidelines on establishing a firm opening net worth is not mandated by the Constitution or statute. The guidelines are not rules informing I.R.S. agents on how to safeguard express constitutional rights.

This Court also believes that any deviation from the guidelines in question would not raise any constitutional questions. In the present case it does not appear that these guidelines on establishing an opening net worth were designed to protect the party dealing with the I.R.S. Instead, these guidelines appear to be an

aid to I.R.S. special agents in determining what questions should be asked while conducting an investigation.

This Court also notes that defendant Bunch could not claim a due process violation if this Court should find that Barbara Kastl did not follow the guidelines. Defendant Bunch cannot claim that he relied upon these guidelines or that a deviation from the guidelines affected his conduct since his filing of the tax returns in question occurred long before the alleged breach. See United States v. Cormier, 639 F.2d 1177, 1180 (5th Cir. 1981). The defendant also cannot claim that a deviation from the guidelines would per se result in failure to adequately prove the defendant's opening net worth.

Finally, testimony from the Government's expert witness Mr. Peter Hugenberg, Supervisory Revenue Agent for the Internal Revenue Service, indicates that revenue agents such as Barbara Kastl are not re-

quired to read or adhere to the IRS special agent's manual. Revenue agents apparently have a separate set of guidelines to aid their investigations. In light of this evidence, the Court fails to see how the defendant could claim he was prejudiced by Barbara Kastl not following guidelines she was not required to utilize.

B. Failure to Include Assets in Opening Net Worth

The defendant also argues that the opening net worth in this case was not established with reasonable certainty becuase the Government failed to take into consideration furniture owned by the defendant. The record indicates no evidence of substantial transactions by the defendant involving furniture. It does not appear that the defendant furnished the IRS with reasonable leads of furniture sales which would change his financial position. Thus, this Court feels the Government was justified in treating the defendant's furniture assets

as a constant during the tax years in question. To the extent that the defendant attempted to argue at trial that significant sales of furniture occurred, the jury was faced with a question of fact. There was sufficient evidence for the jury to reject the defendant's position and find the defendant guilty beyond a reasonable doubt.

III. RECOGNITION OF THE GAIN FROM THE SALE OF DEFENDANT'S LANE AVENUE RESIDENCE

The defendant argues that his conviction on Count II of the indictment was improper because the Government sought to include in the net worth computation for the 1974 tax year evidence of gain realized on the sale of the defendant's principal residence. As this Court noted earlier, this Court must view the evidence in this case in the light most favorable to the Government to determine whether there is sufficient substantial proof, direct and circumstantial, together with inferences reasonably drawn therefrom, on which the

defendant might be found guilty beyond a reasonable doubt.

The Government presented evidence in this case which tended to show that the defendant has unreported taxable income of approximately $14,600 for the 1974 tax year.[2] This figure included half of the gain realized by the defendant on the sale of the defendant's West Lane residence since the Government felt the defendant was only entitled to the exclusion provided for in 26 U.S.C. 1202. However, if the defendant is correct and if pursuant to 26 U.S.C. §1034 the defendant did not have a duty on April 15, 1975, to report any gain on the sale of the West Lane property, approxi-

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[2] Dollar amounts used in this section of the opinion have been rounded to the nearest hundred dollars. Because the Government is not required to prove an exact figure of taxes due, rounding will not affect the present analysis. Mr. Hugenberg used $14,651 as the amount of the defendant's unreported taxable income in 1974. The Court will give the defendant the benefit and round this to $14,600.

mately $10,200[3] would have to be deducted from the unreported taxable income figure which the Government claims as correct.

Ignoring the gain realized from the sale of the West Lane property and viewing the remaining evidence in the light most favorable to the Government, there was proof tending to show that the defendant had failed to report approximately $4,400 in taxable income. The defendant in his 1974 tax return reported taxable income of $8,283.10. Thus, the Government's proof, excluding the gain from the sale of the West Lane property, indicates that taxes would be due on approximately $12,683 of

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[3] Gain realized by the defendant after sale of the West Lane property was said to be $20,444 at one point in the trial. However, on cross examination Mr. Hugenberg did indicate that the 26 U.S.C. §1202 exclusion would equal $10,200. For purposes of this discussion the Court will use the figure of $20,400 to represent the gain from the sale of the West Lane property and $10,200 as the additional amount which would have to be excluded.

taxable income. Based upon this taxable income figure the defendant would have failed to pay a substantial amount of income taxes. Thus, this Court finds that there is sufficient proof from which a jury could find beyond a reasonable doubt that the defendant willfully attempted to evade substantial taxes due and owing when he filed his 1974 tax return on or about April 15, 1975.

The defendant relies upon a number of cases dealing with attempts by the Government to amend indictments. The present case was tried and submitted to the jury on the theory that defendant Bunch willfully attempted on or about the 15th day of April, 1975 to evade income taxes due and owing by him for the calendar year 1974. The Government did not attempt to amend the indictment to also charge that the defendant attempted to evade taxes on October 15, 1975. Thus, this Court faces a different question than the question addressed by the Sixth Circuit

Court of Appeals in United States v. Pandilidis, 524 F.2d 644 (6th Cir. 1975), where the Government did attempt such an effort. The defendant's reliance on Pandilidis and other cases dealing with amendments to indictments is, therefore, misplaced.

The defendant also cites to a number of cases construing the scope of the phrase "on or about" in a criminal indictment. See Ledbetter v. United States, 170 U.S. 606 (1898); United States v. Lane, 514 F.2d 22 (9th Cir. 1975); United States v. Goldstein, 502 F.2d 526 (3d Cir. 1974); United States v. Goodrich, 493 F.2d 390 (9th Cir. 1974); United States v. Heard, 443 F.2d 856 (6th Cir.), cert. denied, 404 U.S. 850 (1971); Yaw v. United States, 228 F.2d 382 (9th Cir. 1955); United States v. Tramaglino, 197 F.2d 928 (2d Cir.), cert. denied, 344 U.S. 864 (1952).

This Court agrees with the defendant's

contention that October 15, 1975, could not reasonably be construed to be "on or about the 15th day of April, 1975." Thus, if the defendant's duty to report the gain from the sale of the West Lane property could only have arisen on October 15, 1975, the defendant could not have willfully attempted to evade the tax due on that gain when he filed his 1974 tax return on or about April 15, 1975. As the First Circuit has noted in a case involving a prosecution for failure to file a tax return: "Just as subsequent conduct cannot relieve a taxpayer from criminal liability for failure to file tax returns on or before their due date, [citations omitted], [this Court does] not think that subsequent events can transform an act of omission, innocent when it occurred, into a criminal act." United States v. Bourque, 541 F.2d 290, 294 (1st Cir. 1976).

However, this Court notes that the jury may have found that the sale of the West Lane property did not fall within the scope

of the provisions of 26 U.S.C. §1034 because the defendant never intended to reinvest the gain realized from that sale in a new residence. If the defendant never intended to reinvest his gain in a new residence, then the gain from the sale of the West Lane property should have been recognized and reported on the 1974 tax return filed on or about April 15, 1975. Cf., United States v. Swallow, 511 F.2d 514 (10th Cir.) cert. denied, 423 U.S. 825 (1975) (holding that loans obtained in bad faith and without an intent to repy constitute income). In the present case the evidence is undisputed that the defendant failed to reinvest his gain from the sale of the West Lane property in a new residence within the eighteen (18) month period provided for in 26 U.S.C. §1034. The evidence is also undisputed that the defendant never amended his 1974 tax return to reflect any gain from the sale of the West Lane property. Where a defendant has an

opportunity to correct his return, and is on notice that such correction is necessary, his failure to file an amended return may be considered by the jury in determining the defendant's intent. See United States v. DeNiro, 392 F.2d 753, 758 n. 8 (6th Cir.) cert. denied, 393 U.S. 826 (1968); Hill v. United States, 363 F.2d 176, 180 (5th Cir. 1966). Thus, in the instant case the jury could have found that the defendant never intended to reinvest his gain from the sale of the West Lane property; that 26 U.S.C. §1034 did not, therefore, apply to this transaction; and that the defendant was willfully attempting to evade the taxes due on this property when he filed his 1974 tax return. Whether the jury drew such reasonable inferences from the evidence in this case, however, is not determinative, since, as this Court noted earlier, there is sufficient evidence, even excluding the gain from the sale of the West Lane property, for the jury to have found the defendant

guilty.

The Court finds that the defendant's arguments are not well taken. The defendant's Fed. R. Crim. P. 29(c) motion is, therefore, DENIED.

IT IS SO ORDERED.

S/John D. Holschuh
John D. Holschuh, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed
May 12 '81
John D. Lyter,
Clerk
4:09 p.m.

UNITED STATES OF AMERICA, :

Plaintiff, :

vs. : Case CR-2-80-62

WILLIAM DON BUNCH, :

Defendant. :

ORDER

This case is now before the Court upon the motion of defendant Bunch for an order directing the United States to produce the Internal Revenue Service's Special Agent Report (SAR).

The defendant is charged with three counts of income tax evasion in violation of 26 U.S.C. §7201. The government represents that by using the "net worth plus expenditures" method of proof,[1] it will prove that defendant Bunch earned income

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1 The net worth method of proof "compares the value of a taxpayer's assets and expenditures

substantially in excess of the amounts he reported to the Internal Revenue Service in 1973, 1974 and 1975. The SAR is a compilation of memoranda, tax schedules, reports and other documents prepared by a Special Agent of the Internal Revenue Service in the course of an investigation of a taxpayer. United States v. Cleveland, 507 F.2d 731, 736 n. 9 (7th Cir. 1974).

On April 3, 1981, the Court heard oral argument on defendant's motion. During defendant's argument to the Court, defendants counsel stated that he was seeking the SAR in order to challenge the Special Agent's testimony regarding the "opening net worth" attributed to defendant for each of the tax years in question (Tr. 33, 34). Defendant's

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at the beginning and end of a tax year in order to show unreported income." United States v. Gibson, 486 F. Supp. 1230, 1235 (S.D. Ohio 1980). See also, Holland v. United States, 348 U.S. 121, 124 (1954); United States v. Hamilton, 620 F.2d 712, 714 n. 1 (9th Cir. 1980); United States v. Cleveland, 477 F.2d 310, 311 (7th Cir. 1973).

counsel further stated that to deny defendant access to the SAR would, with respect to the Special Agent, deprive defendant of effective cross-ecamination and confrontation. In support of his motion, defendant relies upon United States v. Cleveland, supra, a Jencks Act decision.

The government opposes defendant's motion and maintains that the SAR is not subject to pretrial discovery. Furthermore, the government's trial attorney represents that the Special Agent who investigated defendant in connection with this case may not be called to testify at defendant's trial.

Even assuming that the IRS Special Agent will testify at defendant's trial, it is clear that defendant is not entitled to discover the SAR. Rule 16(a)(2) of the Federal Rules of Criminal Procedure limits discovery otherwise allowed under the rules by providing that the government need not disclose "reports, memoranda, or other

internal government documents made by... government agents in connection with the investigation or prosecution of the case." Rule 16(a)(2), Fed. R. Crim. Proc. Moreover, defendant's reliance upon United States v. Cleveland, supra, is misplaced. Cleveland is a Jencks Act decision. 18 U.S.C. §3500 (1970). The Jencks Act prohibits the pretrial discovery of statements and reports made by prospective government witnesses unless the witness testifies on direct examination at trial, in which case the Act requires the government to produce any previously-made statement of the witness in its possession insofar as it relates to the witness' testimony at trial.[2] United States v. Nickel, 552 F.2d 684, 688 (6th Cir. 1977).

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[2] The Jencks Act, 18 U.S.C. §3500, provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or

In Cleveland the Seventh Circuit Court of Appeals held that the entire SAR in a criminal tax evasion case is a statement under the Jencks Act.3 507 F.2d at 737. Notwithstanding the fact that the Special Agent may not testify at defendant's trial and thus, defendant's argument in favor of a Jenck's disclosure is premature, the Cleveland court's position has not been followed by the Sixth Circuit. In United States v. Dark, 597 F.2d 1097 (6th Cir. 1979), for example the Sixth Circuit held

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prospective Government witness (other than the defendant) shall be the subject of a subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. 18 U.S.C. §3500(b) (1970).

that the contents of an IRS Special Agent's case report in a criminal tax prosecution did not constitute a statement under the Jencks Act. 18 U.S.C. §3500(e). Furthermore, in a factually similar case involving

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It should be noted that with respect to disclosure of prior relevant statements of witnesses, the Jencks Act has been supplemented by new Rule 26.2 of the Federal Rules of Criminal Procedure which is designed to place disclosure of prior relevant statements of defense witnesses on the same legal footing as is the disclosure of prior relevant statements of prosecution witnesses under the Jencks Act. Wright, Federal Practice and Procedure, Supplement to Vols. 1-3, §435 (1980).

3 The Jencks Act defines "statement" as follows:

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

FBI case reports, the Sixth Circuit rejected the argument that the agent's case reports constituted statements under the Jencks Act.

> (4) We do not find such broad requirements in the Jencks Act or in any of the cases cited to us appellant. The purpose of the Jencks Act itself was to restrict a defendant's right to any general exploration of the government's files -- a right Congress feared it perceived in Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957). See Goldberg v. United States, 425 U.S. 94, 104, 96 S.Ct.1338, 47 L.Ed. 2d 603 (1976); Palermo v. United States, 360 U.S. 343, 345-50, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). (Footnote omitted).
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> United States v. Nickell, supra, 552 F.2d at 688.

Defendant Bunch's motion presents a request for pretrial discovery of government files, or in the alternative, a premature request for disclosure of Jencks material. In view of Rule 16(a)(2) of the Federal Rules of Criminal Procedure and the decisions set forth in United States v. Dark, supra, and United States v. Nickell, supra, neither

request by defendant is meritorious. Inasmuch as defendant will have the opportunity to cross-examine the Special Agent at trial should the government elect to call her as a witness, the defendant's claim that he will suffer a denial of cross-examination and confrontation if he is not provided access to the SAR is unmeritorious. Accordingly, defendant's motion for production of the SAR is DENIED.

IT IS SO ORDERED.

S/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 1983, three copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari were mailed to James Katan, Assistant United States Attorney, at 85 Marconi Boulevard, Columbus, Ohio 43215, Counsel for Respondent. I further certify that three copies have been mailed to the Solicitor General at the Department of Justice, Washington, D.C. on this date.

Sam B. Weiner
SHEWARD & WEINER
743 South Front Street
Columbus, Ohio 43206
Telephone: 614/443-6581

Counsel for Petitioner